## UNITED STATES OF AMERICA

## BEFORE THE NATIONAL LABOR RELATIONS BOARD

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THE LORGE SCHOOL,

Respondent,

and

Case No. 2-CA-37967

LINDA COOPERMAN,

Respondent Brief in Support of Exception to ALJD

An Individual.

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# A. Statement of the Case

Linda Cooperman worked for The Lorge School for three weeks -from July 10, 2006 to August 1, 2006 - when she was discharged. The NLRB, then made up of two Members, held that the discharge violated Section 8(1) because it was motivated by her refusal to assist Executive Director Deborah Kasner in committing an unfair labor practice. 352 NLRB 119 (2008) The decision was enforced by the Second Circuit. 305 Fed. Appx. 811 (C.A. 2 2009)

A compliance specification was issued on February 13, 2009 seeking gross backpay of \$129,003.34 with no deductions for any interim earnings or failure to adequately search for work. The Judge, accepting the amount in the specification, rejected Respondent's argument that the backpay should be reduced because Cooperman admittedly omitted from her search for work positions for which she was qualified, ceased looking for educational positions during the backpay period after April 2007 and unreasonably failed to look for any employment in Brooklyn and Queens during the critical several month period before the

2006-2007 school year began. The Judge also rejected Respondent's contention that her failure to continue to search for work after April 2007 when she "focused on developing her own business" should reduce the amount of backpay that she is owed.<sup>1</sup>

The Board should reduce the amount of backpay owed to Cooperman consistent with the long-standing principal that a discriminate must make reasonable and continuous efforts to secure comparable employment work or suffer a reduction in the amount of backpay that is owed.

# B. Cooperman's Position at Lorge

The Lorge School is a publically-funded school for learning disabled and emotionally challenged children located in New York City.<sup>2</sup> Cooperman was employed as an instructional supervisor, a job that would have required her to work on academic instruction with teachers to insure that the New York State instructional requirements were being properly carried out.<sup>3</sup> As instructional supervisor, she would not have had authority over all aspects of administration. As the underlying JD reveals, Cooperman incorrectly believed that she had authority to implement changes in the school. (JD Green p. 125)<sup>4</sup> It is noted that the authority of Cooperman's position was not clearly defined because she was discharged before the school year began, in part over a dispute as to what Cooperman's role in the school would be. (JD Green p. 125) Thus, it is undisputed that Cooperman did not have authority over the social workers, who, because of the nature and mission of the school, played a large part in the progras. Indeed, Kasner was promoted from this supervisory position to Executive Director. (JD Green p. 121) <sup>5</sup> Moreover, unlike a public school, the administrators at Lorge

<sup>&</sup>lt;sup>1</sup> ALJD of Biblowitz JD(NY)-41-09 herein referred to as "JD Biblowitz".

<sup>&</sup>lt;sup>2</sup> To the extent the Board wishes to balance the equities in this matter, notice may be taken of the consequences on the student population of the school should the Judge's decision be affirmed without modification.

<sup>&</sup>lt;sup>3</sup> ALJD of Judge Green p. 121 herein referred to as "JD Green"

<sup>&</sup>lt;sup>4</sup> Cooperman sought to expand her authority because she believed that the fact that Kasner was not certified by the state to supervise the children justified Cooperman in assuming more managerial authority. See also Testimony of David Osman pages 497 to 517 where he testifies to his authority as a licensed clinical social worker at the school. Cooperman's authority was to be limited to the direct supervision of the teachers. (JD Green p. 125. See also testimony of Barry Malloy, who replaced Cooperman as instructional supervisor page 690 in underlying case noting his authority was limited to supervising teachers.)

<sup>&</sup>lt;sup>5</sup> Se also Transcript in underlying case, p 158.

are responsible to a Board of Trustees which takes an active part in the running of the school. (Testimony of Martha Bernard in underlying case pp 576-588)

In evaluating whether Cooperman's search for work was reasonable it is critical to note that the management structure of Lorge does not correspond to the management structure of generalized public schools.

It is necessary in evaluating the adequacy of Cooperman's search for work, therefore, to consider whether she omitted from that search positions which were comparable to the position that she would have held at Lorge. While the fact that she was unable to secure other employment may not necessarily be evidence of a less than diligent search for work, as the Judge below noted, it is certainly not unreasonable to conclude that perhaps her failure to secure any position may be indicative of the fact that she was applying for positions for which she was not qualified, or at least for which she had no meaningful experience.

# C. Cooperman's Search for Work

The Judge found that Cooperman made an adequate search for work throughout the entire backpay period. Respondent does not contest the fact that Cooperman sought employment. It is not disputed, however, that she Respondent limited her search for work to only assistant principal and principal positions and from admittedly omitting from that search all teaching and tutoring positions, jobs for which she was clearly qualified (JD Biblowitz p. 7). Moreover, it not disputed that Cooperman failed to seek employment in Brooklyn and Queens, New York, for several months after her discharge notwithstanding that those boroughs had a similar commuting distance from her home she had with the Respondent.(JD Biblowitz p. 6)

Cooperman's background was as a teacher. Cooperman worked as a teacher for four years in Brooklyn, NY and left for personal reasons and took a teaching position in Pleasantville High School in Pleasantville, NY for one year. She left that position in 1968, taking time off for family reasons, and returned to teaching in 1991 as an elementary school teacher for five years until 1996. After obtaining a high school license she worked as a math

specialist in for three years until 1999. She obtained a position as an assistant principal in a middle school in the Bronx for one year and was laid off. She then worked as math specialist tutoring children with special needs. It was from this position that she was hired by The Lorge School as "educational supervisor." (Facts recited here are from Cooperman's testimony in underlying case pp 208-210).

The Judge found that teaching positions were not comparable to the educational supervisor position at Lorge because Cooperman testified that someone told her that her qualifications would only qualify her for a teaching position earning \$55,000 to \$65,000, less than the \$75,000 she was earning as an instructional supervisor at Lorge. In an irony apparently lost on the ALJ, he concluded that Cooperman's experience only qualified her for a teaching position making up to \$65,000 but she was reasonable in seeking assistant principal positions making substantially more than that. Obviously, an applicant will not likely be appointed to a position as an assistant principal in a public school (with responsibility for overseeing the entire school including teachers making \$65,000 per year and more) if the individual is only qualified to fill a teaching position that earns no more than \$65,000 per year!

It is also noted that salaries at Lorge are substantially lower than those in the public schools. Thus, no teacher in Lorge earned over \$53,028 during the period in question which could only be obtained with a Masters Degree and 15 years seniority. The salaries of teachers at Lorge began at \$35,182.) (General Counsel Exhibit 3 p. 28 in the underlying case.)

It is undisputed that Cooperman completely stopped looking for education positions beginning in April, 2007. No reduction is made for this willful loss of potential interim earnings because the Judge found that Cooperman, "focused on developing her own business." JD Biblowitz pp 7-8 The Judge places upon Respondent the obligation to show that Cooperman did not devote herself full time to the task of "conceiving, developing and establishing" a food catering business notwithstanding the fact that the business did not even open for over a year after she stopped looking for work. How Respondent is supposed to show that Cooperman did not spend full time thinking about the new business after she gave up looking for assistant principal positions is not explained by the ALJ. Surely there must

have been some time left in the day to seek employment in an educational position, the field in which she actually had some experience.

#### D. Argument

1. Cooperman's backpay should be reduced because she intentionally limited her search for work to positions for which she was not qualified and omitted from her search positions for which she was qualified.

It is well-settled that a discriminatee must make an adequate and reasonable efforts to secure employment. Grosvenor Orlando Associates, Ltd. 350 NLRB 1197 (2007) While the Board in that case was divided over the adequacy of the search, there was no dispute over the principal that the discriminatee must seek interim employment for positions that are reasonably comparable to the position from which the employee was wrongfully terminated. See also Phelps Dodge Corp. v. NLRB 313 U.S. 177 (1941) where the Supreme Court noted that in fashioning a proper backpay order, the NLRB "may give appropriate weight to a clearly unjustifiable refusal [by the discriminatee] to take desirable new employment." The Court noted that in formulating backpay orders, the NLRB must heed "the importance of taking fair account, in a civilized legal system, of every socially desirable factor in the final judgment." 313 U.S. at 198 It has been accepted by the Board and reviewing courts that a discriminatee is not entitled to backpay to the extent that he [or she] fails to remain in the labor market, refuses to accept substantially equivalent employment, fails diligently to search for alternative work, or voluntarily quits alternative employment without good reason. NLRB v. Mastro Plastics Corp., 354 F.2d 170, 174 n. 3 (C.A. 2 1965) cert denied, 384 U.S. 972

Here, Cooperman worked for The Lorge School, a not-for-profit school for learning disabled and emotionally disturbed children, for three weeks during the summer, before the regular school year began. As Judge Green found in the underlying case, the Executive Director of the school wanted to limit Cooperman's expectations of the managerial authority that she would be able to exercise once the school year began. Because the position of educational supervisor is not clearly defined and has no directly comparable position in the public school system, the Board must evaluate whether Cooperman acted reasonably in limiting her search to assistant principal positions, which clearly have greater authority and

responsibility than the instructional supervisor position at Lorge. An assistant principal generally has overall responsibility for all aspects of the school and has authority over teachers making substantially more money than the teachers at Lorge. Surely this is an indication of their superior knowledge and experience in the education field. The educational supervisor at Lorge does not have responsibility over the clinical social workers, a critical component of achieving special mission of a school in teaching learning disabled and emotionally disturbed children. An assistant principal, on the other hand, is responsible to a principal who acts as the chief executive of the school with the right to hire and fire teachers. The instructional supervisor at Lorge is responsible to an Executive Director who is herself responsible to a Board of Trustees that is actively involved in the running of the school. Further, it must be understood that Cooperman never actually performed the job of the educational supervisor because she was discharged before the school year began. It is not possible, therefore, to determine with precision what her ultimate responsibilities would have been.

Under the circumstances, it is reasonable to look to her employment background to determine what positions she was clearly qualified to hold. As a teacher for over 30 years, surely she was in a position to return to the labor market in that position. Cooperman is to be commended for trying to obtain a promotion to more responsible managerial positions, and the record supports her efforts to do so. It is quite another thing for the NLRB to reward such limited attempts to secure interim employment, thereby penalizing the school, with its consequential impact on the students and remaining teachers, for Cooperman's failure to adequately seek comparable employment. As the Supreme Court said in <a href="Phelps Dodge">Phelps Dodge</a>, the Board remedy must take account of all socially desired factors. Failing to reduce Cooperman's backpay at all for her truncated search for work, we submit, fails to fulfill that Supreme Court mandate.

2. Cooperman's admitted failure to seek any educational positions after April, 2007 disqualifies her from backpay after that time.

Cooperman admits that she ceased looking for work after April, 2007. The Judge excuses such action by crediting Cooperman's statements that she was focused on opening a

catering business. The business did not open until over a year later in May, 2008; it earned no money and soon folded. Respondent does not contend, as the ALJ implies, that Cooperman was in less than good faith in trying to open a business. While the business was a total failure in generating income, she is to be commended for trying. Respondent does maintain, however, that the record is devoid of any reason why Cooperman found it necessary to curtail all her other job seeking responsibilities. No doubt, Cooperman was discouraged in failing to obtain any employment. Notwithstanding that discouragement, she steadfastly refused to apply for any educational position after April, 2007. Respondent submits that such action does not demonstrate a good faith effort to secure interim employment.

# E. The Board should await a third Member before deciding this appeal.

Litigation over the authority of two Members to decide cases is pending before the Supreme Court. Laurel Baye Health Care of Lake Lanier, Inc. v. NLRB It is unnecessary to recite the arguments made in that case. Should the Court decide that the Board was without legal authority to decide the underlying case, the impact of that decision on the instant case and cases similarly situated will have to be determined based on the Court's rationale,. Accordingly, even assuming the Board remains of the opinion that it has the authority to decide this case with two Members, it should withhold doing so until the Court decides Laurel Baye. Indeed, a third Member may be able to make a valuable contribution into the issues herein, the very reason why the Board has historically decided cases with a minimum of three Members.

## F. Conclusion

Based on the foregoing, Respondent respectfully requests that it should await the Supreme Court's opinion in <u>Laurel Baye</u>. However, if it declines to do so, Cooperman's backpay should be terminated in April, 2007 and the matter should be remanded to the ALJ to consider the amount of backpay Cooperman should receive for the period from August 1, 2006 to April, 2007 reduced in light of her admittedly limiting the positions for which she sought employment to assistant principal and principal positions for which she was not fully qualified, rather than teaching positions for which she was clearly qualified.

Respectfully submitted,

Daniel Silverman Counsel for Respondent

January 19, 2009